

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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|------------------------|---|--------------------|
| FRANCIS V. PULLELLA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civ. No. 04-75-SLR |
| |) | |
| DELAWARE DEPARTMENT OF |) | |
| LABOR, |) | |
| |) | |
| Defendant. |) | |

MEMORANDUM ORDER

At Wilmington this 25th day of May, 2004, having reviewed plaintiff's motion to amend, as well as defendant's motion to dismiss, and all the papers submitted in connection therewith;

IT IS ORDERED that:

1. Defendant's motion to dismiss (D.I. 5) is granted and the above captioned action is dismissed, for the reasons that follow:

a. **Standard of review.** In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483

(3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972); Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 456 (3d Cir. 1996). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). Not only may the lack of subject matter jurisdiction be raised at any time, it cannot be waived and the court is obliged to address the issue on its own motion. See Moodie v. Fed. Reserve Bank of NY, 58 F.3d 879, 882 (2d Cir. 1995). Once jurisdiction is challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000).

Under Rule 12(b)(1), the court's jurisdiction may be challenged either facially (based on the legal sufficiency of the

claim) or factually (based on the sufficiency of jurisdictional fact). See 2 James W. Moore, Moore's Federal Practice § 12.30[4] (3d ed. 1997). Under a facial challenge to jurisdiction, the court must accept as true the allegations contained in the complaint. See id. Dismissal for a facial challenge to jurisdiction is "proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-1409 (3d Cir. 1991) (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

Under a factual attack, however, the court is not "confine[d] to allegations in the . . . complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction." Gotha v. United States, 115 F.3d 176, 179 (3d Cir. 1997). See also Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891-892 (3d Cir. 1977). In such a situation, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Carpet Group, 227 F.3d at 69 (quoting Mortensen, 549 F.2d at 891). Although the court should determine subject matter jurisdiction at the outset of a case, "the truth of jurisdictional allegations need not always be determined with finality at the threshold of

litigation.” Moore at § 12.30[1]. Rather, a party may first establish jurisdiction “by means of a nonfrivolous assertion of jurisdictional elements and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection).” Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 537-38 (1995) (citations omitted).

b. **Facts.** In this case, the relevant facts are essentially undisputed. Plaintiff brings this action against the Delaware Department of Labor, the administrative agency that handled both the processing of certain charges of discrimination brought by plaintiff in 2001 and 2002, as well as his unemployment insurance claim in 2002. The underlying charges relate to his termination from employment by Superfresh. In his complaint, plaintiff asserts that defendant, “charged by the State of Delaware with protecting the rights of employees accepted, at every step of the process, unfounded statements from the employer and failed to protect plaintiff’s civil rights to due process.” (D.I. 1)

c. **Analysis.** Claims for money damages against the State of Delaware and its agencies are barred by the doctrine of sovereign immunity as set forth in the Constitution of the

State of Delaware, Article I, and the Eleventh Amendment of the United States Constitution, which bars suits by citizens in federal court against states. See Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Doe v. Cates, 499 A.2d 1175, 1176 (Del. 1983). Therefore, to the extent plaintiff requests money damages for the allegedly wrongful conduct at issue, such request must be denied.

d. To the extent plaintiff requests equitable relief, such request likewise must be denied. The complaint at bar is premised upon the provisions of Title VII of the Civil Rights Act, 42 U.S.C. 2000e-5. Title VII allows suits to be filed against employers once claims of employment discrimination have been processed by various administrative agencies, including defendant. Even accepting plaintiff's contentions as true, it is clear from the record that the administrative process before defendant was completed and that plaintiff, in fact, has filed suit against his employer. See Pullella v. Super Fresh Food Markets, Inc., Civ. No. 03-711-SLR (D. Del.). Therefore, no prejudice has flowed from defendant's determination of "no reasonable cause."

e. Likewise, plaintiff pursued the denial of his unemployment insurance benefits at least through the Unemployment Insurance Appeal Board. (See D.I. 1, attachment) Plaintiff had a legal right for judicial review of the Board's decision

pursuant to 19 Del C. § 3323. Although it is not clear whether plaintiff pursued his right of appeal, no prejudice can attach to the Board's decision when there are statutory remedies available for redress of any claimed injury.

2. Plaintiff's motion to amend the complaint to assert a personal injury claim (or a claim under the Americans with Disabilities Act) against defendant (D.I. 7) is denied as futile, for the reasons stated above.

Sue L Robinson
United States District Judge